IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 835 of 1992

For Approval and Signature:

Hon'ble MISS JUSTICE R.M.DOSHIT
and
Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

THAKORE MATHURJI VIHAJI

Versus

STATRE OF GUJARAT

Appearance:

MR YU MALIK for Petitioner

MR KT DAVE, APP, for Respondent No. 1

CORAM : MISS JUSTICE R.M.DOSHIT
and
MR.JUSTICE A.L.DAVE

Date of decision: 07/12/2000

ORAL JUDGEMENT

(Per : MR.JUSTICE A.L.DAVE)

1. This criminal appeal arises out of a judgment and order rendered in Sessions Case No.106 of 1992 by the learned Additional Sessions Judge, Mehsana, on July 24, 1992. The appellant came to be convicted for offences punishable under Section 302, Indian Penal Code and Section 135, Bombay Police Act. The Trial Court sentenced the appellant who was the accused in the Sessions Case to undergo imprisonment for life and to pay a fine of Rs.100/- for the offence or murder of one Chanduji Pratapji. The Court also directed that in event of default in payment of fine, the accused should undergo simple imprisonment for a period of seven days. No separate sentence was imposed for conviction under Section 135, Bombay Police Act.

2. The facts of the case, in a narrow compass, are that a First Information Report came to be lodged by Mansangji Bapuji Thakore of Jasalpur, taluka Kadi, district Mehsana, with Kadi Police Station on the 22nd December, 1991. In the F.I.R., it is stated that the complainant along with his mother Dhaniben and nephew-Akheraj had gone to their field for plucking castor. They came back by 1.30 in the afternoon for lunch and, after taking rest for some time, they went back to the field at about 3.00 P.M. While they were working in their field, at about 4.00 P.M., Chanduji, son of Pratapji Chhaganji, came there for collecting fodder and was collecting the same from the field of Patel Manilal Gokaldas. After about 10-15 minutes, the complainant heard some verbal encounter from that direction. They saw that Mathurji Vihaji Thakore (the appellant) was quarrelling with Chanduji and was giving him abuses and, thereafter, assaulted Chanduji. The complainant, therefore, started towards them, followed by Akheraj and his mother, respectively. Chanduji was asking Mathurji as to why is he causing mischief into his field by stealthily grazing his cattle into the field. When the complainant was at a short distance, he saw that Mathurji Vihaji drew a knife from his waist-band and gave repeated knife blows in the chest and the back of Chanduji in quick succession. Chanduji raised shout and fell down and Mathurji Vihaji ran away with the knife. The complainant and the other two reached near Chanduji and found that he was lying on the floor and there were injuries on chest. The deceased was bleeding from nose and mouth and that the deceased had expired, as he did not respond to the calls. The complainant, therefore, immediately rushed home. His father was not available as he had gone to Kadi. He had left his mother and nephew-Akheraj near the dead body. The other neighbours had also gone for their work in the field. After some

time, his father and his brother-Bhupatji came home. The complainant, therefore, told them about the incident. All the three of them came to the place where Chanduji was lying and, thereafter, went to Kadi Police Station on foot for lodging the F.I.R.

2.1 On basis of the F.I.R., an offence was registered and investigation made. The Investigating Officer prepared Panchnama of the scene of offence, Inquest Panchnama and also recorded the statements of relevant witnesses. Post-mortem was got performed of the dead body and having found sufficient evidence against the accused, charge sheet was filed in the Court of learned Judicial Magistrate, First Class, Kadi. Since the case was triable exclusively by a Court of Sessions, the learned Judicial Magistrate, First Class, Kadi, committed the case to the Court of Sessions at Mehsana, which was registered as Sessions Case No.106 of 1992.

2.2 Charge against the accused was framed at Ex.3 for offences punishable under Section 302 and 504 of I.P.C. and Section 135 of Bombay Police Act. The accused pleaded not guilty to the charge and expressed his desire to face the trial. The prosecution led evidence and the Trial Court, after considering the evidence on record, came to a conclusion that the prosecution could successfully prove the charges of murder and breach of notification issued by the District Magistrate punishable under Section 302, I.P.C. and Section 135, Bombay Police Act, respectively, and convicted the accused for these offences and sentenced him as stated above. The Trial Court found that the offence punishable under Section 504, I.P.C. could not be proved by the prosecution.

2.3 Aggrieved by the said judgment and order, the accused-appellant has preferred this appeal assailing the judgment and order on various counts.

3. We have heard learned advocate Mr. Malik for the appellant and learned Additional Public Prosecutor Mr. Dave for the respondent-State. We have also gone through the record and proceedings.

4. While taking us through the evidence on record, Mr. Malik submitted that the testimony of the two so called eye-witnesses, Mansang Bapuji (Ex.22) and Dhaniben Bapuji (Ex.25) cannot be believed. The prosecution has not examined any independent witness to lend corroboration to the version emerging from the evidence of these two witnesses. Mr. Malik submitted that the incident has taken place in a field when there would be

many persons around working in the fields and non-examination of independent witnesses by the prosecution may be seriously viewed.

4.1 Mr. Malik submitted further that the unfortunate incident occurred while the accused tried to exercise his right of private defence. He submitted that the accused was pressurised by the deceased to consume liquor. The deceased had already consumed liquor but because the accused did not agree to the offer made by the deceased for consuming liquor, the deceased got wild and attacked the accused. In order to save himself from that attack, the accused exercised his right of private defence and the incident occurred. He submitted that there was no intention on part of the accused to commit murder of the deceased. Mr. Malik submitted that the Trial Court has overlooked this aspect and the accused may, therefore, be given its benefit and may be acquitted.

4.2 By way of alternative submission, he submitted that it is a matter of evidence that something had transpired between the deceased and the accused and in that transaction, the incident had occurred resulting into death of the deceased. Mr. Malik submitted that, therefore also, the case can at the most be said to be falling under the definition of "culpabable homicide not amounting to murder".

4.3 Mr. Malik submitted that the prosecution has deliberately kept back a material eye-witness, Parbatji, which may be seriously viewed. The prosecution has, therefore, failed to honestly put forward the material before the Court to enable the Court to arrive at a just decision. The benefit of this may be given to the accused.

4.4 Mr. Malik, therefore, urged that the appeal may be allowed and the conviction for the offence of murder may be quashed and set aside and appropriate orders may be passed.

5. Mr. Dave, learned Additional Public Prosecutor, has opposed this appeal. He submitted that the right of private defence claimed by the accused is, in fact, not available to him. He submitted that, as such, there is no material to indicate that a reasonable man could have apprehended danger to his person or property. There was no need for the accused to have used knife. Further, Mr. Dave submitted that, as many as, five blows have been given to the deceased by the appellant, three of which are stab wounds and two are incised wounds. Mr. Dave

submitted that, if the nature of injuries is examined, it would indicate that the blows were given with great force which have ultimately damaged the lungs and the heart resulting into instantaneous death of the deceased. Mr. Dave submitted that there was no need for the accused to have given repeated blows even if he was exercising his right of private defence.

5.1 After meeting with the contention raised by the learned advocate for the appellant thus, Mr. Dave submitted that, if the evidence is examined, there is nothing to doubt the testimony of the eye-witnesses. Their story is consistent and lucid. No lacuna is found. No exaggeration or improvement, contradiction or omission is found and there is nothing to disbelieve these witnesses. Only because independent witnesses are not examined, their testimony cannot be disbelieved. Mr. Dave submitted that there is evidence to indicate that when the incident occurred, not many people were around and, therefore, the Trial Court has rightly convicted the accused-appellant not insisting for a support from independent evidence. The appeal may, therefore, be dismissed.

6. We have carefully considered the rival side contentions in light of the evidence on record. We have examined the deposition of complainant-Mansangji (Ex.22) as well as his complaint at Ex.33. We do not find any notable contradiction in his deposition. In cross-examination, he categorically states that when the incident occurred, excepting them, there was nobody else. He denies the suggestion regarding deceased-Chanduji having consumed liquor and upon denial by the accused, deceased-Chanduji having assaulted the accused with a knife. He also denied that Chanduji sustained injuries in the scuffle with the accused. As regards the delay also, he has been cross-examined and he states that they reached Kadi Police Station at about 7.00 P.M. They had to go on foot because they could not get a conveyance. They tried to telephone the police from Dairy as well as the hospital, but they could not connect the telephone with the Police Station. Thus, the time lag is also explained.

7. Dhaniben is examined as P.W.4 at Ex.25. She also gives a consistent version emerging from the F.I.R. (as narrated above) and the deposition of complainant-Mansangji Bapuji. We have closely scrutinized the deposition of this lady, particularly the cross-examination, to find no material lacuna, contradiction or omission in her deposition.

8. The post-mortem notes are at Ex.24, which are brought on record through the deposition of Dr. Chaturbhai Savabhai Parmar. These two documents indicate that there were six external injuries on person of the deceased. The doctor has deposed that the deceased had one stab would 2" x 1/2", cavity deep, going to the lungs. The left clavicle bone was cut. There was one more stab wound of the size of 2" x 1/2" going cavity deep near sternum. The bone was also cut. There was third stab would of the size of 2" x 1/2" with a depth going upto the heart. The 5th and the 6th ribs were cut. There was an incised would of the size of 2 1/2" x 1/4" skin deep on the stomach on the right hand side. There was an abrasion of about 3" on the left side and there were irregular abrasions on the right wrist.

8.1 The internal injuries indicate that lungs and heart were perforated and ribs were also cut at different places corresponding to the external injuries. The doctor has deposed that the injuries were sufficient in ordinary course of nature to cause death of a human being. The doctor is cross-examined and he says that, if an assailant is totally drunk and has a knife in his hand and if the person assaulted upon tries to defend himself by holding hand of the assailant, external injuries No.1 to 4 are possible, but it would depend on how much force was used and also on their situation/position.

9. Having considered these pieces of evidence, in our opinion, the prosecution is rightly held to have proved the case against the appellant-accused. It is not possible to accept the contention raised by the learned advocate for the appellant that the version of the eye-witnesses cannot be believed as it does not get any support from independent evidence. In fact, it is a matter of record as emerging from the cross-examination of the complainant that there were no people around the place of incident at that time and the prosecution, therefore, could not be expected to examine independent witnesses. Non-examination of independent witnesses by itself cannot render the deposition of these witnesses unbelievable simply because they are relatives of the deceased.

10. Regarding the contention that the appellant-accused exercised his right of private defence, it may be noted that there is nothing to indicate that the deceased had assaulted him in such a manner that he could have reasonably anticipate or apprehended risk to his life. Assuming for a minute that he had such

apprehension, then also, there was no need for him to have caused as many as six successive injuries with such a great force as would cut the ribs, enter the thoracic cavity, cut the lungs as well as perforate the heart. The force with which the injuries are caused coupled with the number of injuries caused would clearly indicate the intention of the assailant. The suggestion made to the witnesses in this regard has been denied by the witnesses. The defence as emerging from his further statement (Ex.35) also is only to the effect that he was pressed for taking liquor by the deceased and upon his denial, the deceased got up with a knife and attempted an assault. He caught hold of the hand of the deceased and there was a scuffle. This defence does not appeal to us, particularly considering the number of injuries that are caused and the evidence of the doctor in cross-examination. If the deceased was really drunk and if an attempt was made by the accused to ward off a blow, there was no need for a scuffle or causing successive six injuries. These injuries could not have been caused accidently. In fact, the defence is coming with different versions. The suggestion to the doctor indicates that the injuries were possible in an accidental scuffle. the contention is regarding exercising of right of private defence which is not possible to be accepted.

11. Vehement arguments were advanced regarding non-examination of witness-Parbatji. The Investigating Officer-Chhaguji Chaturji Rajput (Ex.32) in his cross-examination has admitted certain things. He has stated that it had emerged from the statement of the wife of the deceased that the deceased used to drink occasionally and used to distil liquor himself. It was also revealed that there were prosecutions against the deceased under the Bombay Prohibition Act. It is stated that Parbatji's statement revealed that the deceased and Parbatji had consumed liquor in the field of Manibhai. The statement also reveal that deceased-Chanduji had insisted upon Mathurji to consume liquor and Mathurji refused to consume liquor as that was a Sunday, a pious day. Despite this, Chanduji pressed Mathurji to consume liquor and Chanduji himself consumed liquor. The statement of Parbatji also reveal that Chanduji abused Mathurji and told him that he commits theft of liquor and causes mischief in the field and, therefore, he would not let accused go without consuming liquor and if he does not do so, he will have to be beaten. It was also revealed from the statement that Chanduji started giving abuses to Mathurji. Mathurji told him not to do so and, therefore, Chanduji suddenly got up and assaulted the

accused. Parbatji, therefore, separated them and went to another field. The Investigating Officer has admitted that statements of Bhupatji and Raiben indicate that the incident had occurred in the afternoon. Even if what has come on record during cross-examination of the Investigating Officer is accepted, what emerges is that there was a scuffle between the two and, thereafter, Parbatji separated the deceased and the accused. The incident has taken place thereafter, regarding which there is deposition of Mansang Bapuji and Dhaniben Bapuji. It is, therefore, not possible to accept the contention that the accused caused injury to the deceased in exercise of his right of private defence. The scuffle was over. Parbatji separated both of them and, thereafter, the incident has occurred and, therefore, the case of the appellant that the deceased assaulted him with a knife and while defending himself, this incident occurred is not possible to be accepted.

12. The ultimate result is that the prosecution has been able to establish the case against the accused persons with direct testimonial evidence of Mansang Bapuji and Dhaniben Bapuji, supported by medical evidence in form of post-mortem report (Ex.24) and deposition of Dr.Chaturbhai Savabhai Parmar (Ex.23). The defence taken by the accused is not possible to be accepted for the reasons stated above. The result is that the conviction recorded by the Trial Court of the accused persons requires to be upheld while dismissing the appeal.

13. The appeal is, therefore, dismissed. The judgment and order passed by the learned Additional Sessions Judge, Mehsana, dated the 24th July, 1992, in Sessions Case No.106 of 1992 is hereby confirmed.

[MS. R.M. DOSHIT, J.]

[A.L. DAVE, J.]

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